EXHIBIT C

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February 12, 2010

VIA ECF

Hon. Jose L. Linares, U.S.D.J.
United States District Court for the
District of New Jersey
Martin Luther King, Jr. Federal Building
50 Walnut Street, Room 2042
Newark, New Jersey 07101

Re: *Larson, et al. v. AT&T Mobility LLC f/k/a Cingular Wireless LLC, et. al.*
Civ. No.: 07-5325 (JLL)

Dear Judge Linares:

This firm represents the Sprint defendants in the above-referenced matter. We regret troubling the Court, however, there is continued litigation in In re: Cellphone Termination Fee Cases JCCP 4332. This continued litigation involves claims that were settled and released pursuant to the Settlement that was approved by this Court's Opinion of January 15, 2010 [Doc. No. 438] and Order of that same date [Doc. No. 437]. As Your Honor can see from the filing attached as Exhibit A, certain counsel, many of whom appeared before Your Honor at the Fairness Hearing, have recently filed an application to renew a request for a temporary restraining order and injunctive relief in the California Subscriber case. That application was previously enjoined by this Court. The attached application is plainly a collateral attack on this Court's Opinion and Order approving the Settlement in this matter.

As Your Honor will recall, an All Writs Act Injunction was initially entered on January 26, 2009, staying among other things further litigation of the California Subscriber case [Doc. No. 139]. A copy of that Opinion is annexed hereto as Exhibit B. As the Court noted therein, "to allow the Subscriber Class case to go forward with its request for injunctive relief in California would directly undermine the Larson Settlement . . ." [Doc. No. 139 at p. 3]. That injunction was extended by this Court on April 30, 2009 [Doc. No. 322] up until the date the Opinion regarding final approval of the Settlement was issued. Unfortunately, the need for additional injunctive relief is now both immediate and apparent.

We respectfully request that the Court execute the proposed Final Judgment that was submitted on February 5, 2010 as soon as possible. [Doc. No. 454]. A copy of the February 5, 2010 filing is annexed hereto as Exhibit C. The Final Judgment contains the following permanent injunctive relief:

> 23. No Settlement Class Member, either directly, representatively, or in any other capacity (other than a Settlement Class Member who validly and timely submitted a valid Request for Extension), shall commence, continue, or prosecute any action or proceeding against any or all Sprint-Nextel Released Parties in any court or tribunal asserting any of the Class Released Claims defined in the Agreement, and are hereby permanently enjoined from so proceeding.

This language is virtually identical to the language in the proposed Final Judgment that was appended to the Motion for Preliminary Approval [Doc. No. 84-4]. The entry of this proposed form of Final Judgment is referenced in the Settlement Agreement as a requirement for Sprint's approval of the Settlement [Doc. No. 84-2 p. 44]. No party objected to this injunctive relief language at the Final Fairness Hearing or at any other time, nor has a single objection been registered to the request for entry of the Final Judgment that was made on February 5, 2010. Accordingly, it is respectfully requested that the Court execute the Final Judgment so that the annexed application will be enjoined.

If the Court desires, we are available for a conference or other appearance in connection with this request. Thank you for Your Honor's consideration.

Respectfully submitted,

s/ Joseph A. Boyle

Joseph A. Boyle

JAB:mc
Attachments
cc: All Counsel (via ECF)

EXHIBIT A

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Trial Counsel for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

In re:

CELLPHONE TERMINATION FEE CASES

This document relates to:

Ayyad v. Sprint Spectrum, L.P., et al., Case No. RG03-121510

JCCP 4332

Class Action

PLAINTIFFS' RENEWED APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION

Date: March 5, 2010
Time: 9:30 a.m.
Dep.: 23
Reservation No. R1035380

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Plaintiffs hereby renew their application for a temporary restraining order and for an order requiring defendant Sprint Nextel ("Sprint") to show cause why a preliminary injunction should not issue enjoining Sprint from charging flat early termination fees to its California customers. This renewed application will be heard on March 5, 2010 at 9:30 a.m. in Dept. 23 of the above-entitled Court, at 1221 Oak Street, Fourth Floor, Oakland, California, before the Hon. Winifred Smith.

This application is made pursuant to the provisions of Code of Civil Procedure sections 526 and 527 and the Court's December 4, 2008 Statement of Decision finding Sprint's flat early termination fee illegal under California law and on the grounds that plaintiffs and the class members will suffer irreparable injury if Sprint is not enjoined from charging flat early termination fees to its California customers.

This application is based upon the memorandum of points and authorities in support and the declaration of L. Timothy Fisher, the December 4, 2008 Statement of Decision, the pleadings and papers on file in this action and such matters as may be presented to the Court at the hearing on the application.

Dated: February 11, 2010

Respectfully submitted,

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Trial Counsel for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

In re:	JCCP 4332
CELLPHONE TERMINATION FEE CASES	Class Action
This document relates to:	**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR RENEWED APPLICATION FOR AN ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER**
Ayyad v. Sprint Spectrum, L.P., et al., Case No. RG03-121510	Date: March 5, 2010 Time: 9:30 a.m. Dept.: 23
	Reservation No. R1035380

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Millions of these agreements remain in term or recently terminated, with the same illegal flat ETFs addressed by Judge Sabraw's recent decision. Based on Sprint's recent statements and conduct, it appears that Sprint intends to continue to charge and to attempt to collect these illegal fees on through November 2, 2010, when they will presumably be phased out due to attrition. These ongoing charges will likely total close to a billion dollars nationwide, with about one-fifth charged to California accounts.

III. THE COURT SHOULD GRANT PLAINTIFFS' REQUEST FOR A TRO

A. Plaintiffs Have Previously Estabished The Merits Of Their TRO Application

The papers submitted with plaintiffs' initial TRO application established both requirements for the issuance of a TRO. Plaintiffs showed a complete likelihood of success on the merits since this Court had already determined that Sprint's ETFs are illegal after a full trial on the merits. *See* 12/26/08 Memorandum of Points and Authorities In Support Of Plaintiffs' Application For Order To Show Cause And Temporary Restraining Order at 6-12, Exh. A to the Fisher Decl. Plaintiffs also showed irreparable injury and a balance of harms tipping completely in plaintiffs' favor. *Id.* at 12-13. Plaintiffs also showed that public policy weighs heavily in favor of the proposed injunction. *Id.* at 13-14.

The only question remaining is whether Sprint can escape the consequences of this Court's rulings and can continue to impose illegal charges that have been shown to cause irreparable injury to members of a certified class. Sprint will no doubt argue that this Court is powerless to stop Sprint's illegal conduct because the *Larson* judgment is res judicata of the claims in this action. Sprint is wrong. This court is not powerless. This court has the ability, and the obligation, to *independently* determine the merits of Sprint's res judicata defense. For the reasons explained below, Sprint's defense has no merit.

B. The *Larson* Settlement Is Not Res Judicata Because Plaintiffs Were Not Adequately Represented and Did Not Receive Adequate Notice

Absent class members have a "clear right" to collaterally attack a class action judgment which purports to bind them. *See Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 968, fn. 12 (quoting *Some Preliminary Observations Concerning Civil Rule 23* by Judge Marvin E. Frankel (1967) 43 F.R.D. 39, 46; *see also* 4 H. Newberg and A. Conte, *Newberg on Class Actions* (4th ed. 2002) §11.64 at 246 (leading class action treatise noting the importance of collateral attacks on class action judgments).[3] In *Janik v. Rudy, Exelrod & Zieff* (2004) 119 Cal.App.4th 930, the First Appellate District declared that a "collateral attack upon a judgment entered in a class action on the grounds that the interests of absent class members were not adequately represented has *long been sanctioned*." *Id.* at 944, fn. 3 (emphasis added and citations omitted); *see also Simons v. Horowitz* (1984) 151 Cal.App.3d 834, 844 (holding that a court may refuse to hold a class action judgment binding on the absent parties if it concludes that the class was not adequately represented). In fact, it would violate due process to bind an absent class member to a judgment from a proceeding in which the member was not adequately represented or did not receive adequate notice. *See Hansberry v. Lee* (1940) 311 U.S. 32, 42-45 ("Nor without more, and with the due regard for the protection of the rights of absent parties which due process exacts, can some be permitted to stand in judgment for all."). Under California law, this Court must carefully scrutinize the *Larson* settlement to determine whether it is res judicata and binds the members of the Subscriber Class or whether this action may proceed unabated. *See Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 706; *see also* 4 Witkin, *California Procedure* (5th Ed. 2008), Pleading § 270 at 346 ("But if the judgment is thereafter collaterally attacked by an absent party, a more careful scrutiny of its representative character may be made in determining whether it is res judicata."). That is an issue that was not determined, and could not have been determined, by Judge Linares in the *Larson* case. It is an issue for *this* court to determine.

1. Subscriber Class Members Were Not Adequately Represented in the *Larson* Action

[3] The court in *Cartt* also recognized, "[a] defendant who in one way or another victimizes hundreds of thousands, has, after all, no constitutional right to be subjected to only one lawsuit." *Id.* at 968.

Plaintiffs and the members of the Subscriber Class were not adequately represented in the *Larson* action because the claims of the Subscriber Class were never asserted in that case. The class representatives in *Larson* included only persons who had terminated service with Sprint. There were no representatives that were current subscribers still subject to Sprint's illegal ETFs. *See Larson* Second Amended Complaint ¶¶ 7-11, Exh. C to the Fisher Decl. Indeed, the *Larson* plaintiffs never asserted claims on behalf of current subscribers and never sought prospective injunctive relief on behalf of subscribers subject to illegal ETFs, but yet to be charged. *See Larson* Complaint, Exh. D to the Fisher Decl., and *Larson* First Amended Complaint, Exh. E to the Fisher Decl. (asserting no claims on behalf of subscribers, and seeking no prospective relief). It was not until after the proposed settlement was made that such claims were cobbled into a new complaint. The *Larson* plaintiffs did not assert the subscriber class claims because they lacked standing to assert them. This lack of standing renders the Larson plaintiffs inadequate to represent current subscribers. *See, e.g., Hassine v. Jeffes* (3d. Cir. 1988) 846 F.2d 169, 175-75 (holding that plaintiffs who lack standing are "inadequate class representatives"); *see also La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864, 875 ("The cases uniformly hold that a plaintiff seeking to maintain a class action must be a member of the class he claims to represent.").

The *Larson* class representatives had no interest in stopping those charges because, as former customers, they were no longer subject to them. Prospective injunctive relief was therefore of no value to those class representatives. That is why they did not seek it in their complaint and did not negotiate for it in their settlement. But prospective injunctive relief against these charges is of enormous value to the Subscriber Class in this case, who Sprint continues to charge millions of dollars each month in illegal ETFs. The claims of the *Larson* class representatives are therefore atypical of the claims of the Subscriber Class and the Larson class representatives are inadequate representatives for the members of the Subscriber Class.

The failure of the *Larson* class representatives to assert claims on behalf of the Subscriber Class also renders them inadequate under *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447. Under *City of San Jose*, the *Larson* class representatives are inadequate because they did not assert

all claims reasonably expected to be raised by members of the class. *Id.* at 464 ("The plaintiffs here inadequately represent the alleged class because they fail to raise claims reasonably expected to be raised by the members of the class and thus pursue a course which, even should the litigation be resolved in favor of the class, would deprive class members of many elements of damage."). The *Larson* class representatives should have asserted claims on behalf of not only those former subscribers who paid ETFs but also those current Sprint subscribers who were still subject to an ETF. Indeed, Sprint is quite familiar with this proposition as it has repeatedly asserted it in this coordinated proceeding. For instance, in its July 13, 2006 opposition to plaintiffs' motion for reconsideration, Sprint cited *City of San Jose* and stated "Class counsel and class representatives who do not pursue all claims the class members reasonably would expect to assert in the litigation against the defendant are not adequate." 7/13/06 Opposition of Defendants to Plaintiffs' Motion for Reconsideration, Exh. F to the Fisher Decl. Indeed, Mr. Surprenant vigorously argued this point before Judge Ronald Sabraw at the class certification hearing in 2006:

> "[W]e emphasized in our opening statement and at pages 9 through 12 that that violates our due process rights, the defendants, because if the plaintiffs do not pursue all the claims that they could reasonably be expected to assert -- that is a quote from City of San Jose versus Superior Court cited repeatedly in our surreply, 12 Cal.3d 447 -- then the plaintiffs have not had adequate representation. ***The reason that's important to the defendant, that exposes us in violation of our due process rights as the Hansberry v Lee, the United States Supreme Court which we cite, says because then we're exposed to collateral attack in later costly litigation.***
>
> So what happened in the City of San Jose, Your Honor, there was a class of homeowners of the subdivision that sued the municipality because of aircraft noise, nuisance. The named plaintiff only brought a claim for diminution in property value. And the California Supreme Court said, well, there were a variety of remedies that you could have pursued. By seeking damages – this is at 12 Cal.3rd 464. Quote, "By seeking damages only for diminution in market value, plaintiffs would effectively be waiving on behalf of hundreds of class members any possible recovery of potentially substantial damages." And the Court said that was inadequate representation --
>
> THE COURT: Inadequate?
>
> MR. SURPRENANT: Inadequate. And the Court remanded with an instruction. It said this could not be cured with amendment 465 note 14. It could not cure the failure of a sufficient community of interest.

> The named plaintiffs only wanted one remedy. Absent class members were entitled to seek other remedies. So they remanded and told the Superior Court to strike the class component. And it couldn't be cured.
>
> ...
>
> City of San Jose says what could absent class members reasonably expect claims to be pursued.

6/1/06 Hearing Tr. at 46:27-48:12 (emphasis added), Fisher Decl. Exh. G. Mr. Surprenant was right on this point. The failure of the *Larson* class representatives to assert claims for injunctive relief renders them inadequate under *City of San Jose*, and the *Larson* judgment is thus "exposed to collateral attack" on that ground. *Id.* at 47:9-10. That is exactly the collateral attack the Subscriber Class now brings.

Even Judge Linares recognized that the *Larson* plaintiffs made no effort to protect the interests of the Subscriber Class. In the January 15, 2010 opinion, he wrote: "Plaintiffs did not negotiate or otherwise attempt to enjoin Sprint from enforcing its flat-rate ETFs in the future." 1/15/10 Opinion at 7, Exh. H to the Fisher Decl. Although the federal court in *Larson* was not bound by *City of San Jose*, this court is bound by that decision. *See Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 (discussing the "rule requiring a court exercising inferior jurisdiction to follow the decisions of a court exercising a higher jurisdiction"). Thus, regardless of whatever standards were applied by the federal court in New Jersey, in *this* court, *City of San Jose* is binding and controlling authority establishing the inadequacy of the *Larson* class representatives vis-à-vis the Subscriber Class.

2. The *Larson* Notice Was Inadequate

a. The Larson Notice Violated California Rule of Professional Conduct 2-100

Before Judge Linares even considered preliminary approval and notice to the settlement class in *Larson*, both the Payer Class and Subscriber Class in *Ayyad* had been certified and had received court-approved notices from this court. This Court had also appointed plaintiffs' counsel as class counsel representing both the Payer Class and the Subscriber Class. The notice that was later issued in connection with the *Larson* settlement ran roughshod over the attorney-client

relationship that had established between plaintiffs' counsel in this case and the certified classes in *Ayyad*.

Rule 2-100(A) of the Rules of Professional Conduct of the State Bar of California states:

> While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

Thus, communications with members of a certified class must be made through class counsel. The Federal Judicial Center's *Manual for Complex Litigation, Fourth* explains:

> Once a class has been certified, the rules governing communications apply as though each class member is a client of class counsel. ... Defendants' attorneys, and defendants acting in collaboration with their attorneys, may only communicate through class counsel with class members on matters regarding the litigation.

Id. § 21.33 at 300. Similarly, the Newberg class action treatise makes clear:

> After a court has certified a case as a class action and the time for exclusions has expired, the attorney for the named plaintiff represents all class members who are otherwise unrepresented by counsel. Defense counsel must observe the rules of ethical conduct in these circumstances and communicate with the opposing parties through their attorney, who is counsel for the class.

5 H. Newberg and A. Conte, *Newberg On Class Actions* (4th ed. 2002) § 15:18 at 66.

The Subscriber Class's court-appointed class counsel were not aware of the content of the *Larson* notice or of its imminent dissemination – barely a month after this Court's issuance of notice to the Subscriber Class. This communication did not go through the Subscriber Class's court-appointed counsel, and Subscriber Class counsel did not consent to it. The *Larson* notice thus violated Rule 2-100.

b. *The Larson Notice Conflicted with Prior Notices Issued by This Court*

This Court published notice to Payer Class members by order dated March 18, 2007 and to Subscriber Class members by order dated November 19, 2008. Judge Linares ordered the publication of the *Larson* notice a mere two weeks after the Subscriber Class notice, potentially causing tremendous interference with this Court's notice program and confusion among class members receiving conflicting notices from two different courts within less than a month. The

duelling notices conflict on a number of points. The identity of class counsel. The description of the claims. The scope of the classes. The location of the court. And numerous other basic matters.

The *Larson* settlement notice also omitted essential information. Most notably, the notice failed to mention that Judge Bonnie Sabraw had ruled that Sprint's ETFs were illegal and enjoined their enforcement. That omission was made even worse by the statement that "This notice does not imply that there have been or would be any findings of violation of the law by Sprint Nextel." Long Form Notice at 1, Exh. I to the Fisher Decl. In fact there *was* a "finding[] of violation of the law by Sprint Nextel" two weeks before the *Larson* notice was issued.

On this point and several others, the *Larson* notice provided class members with fundamentally misleading information. And it did so as part of an end-run around their court-appointed attorneys, and an end- run around this Court, which should have had "ultimate control over communications among the parties, third parties, or their agents and class members on the subject matter of the litigation to ensure the integrity of the proceedings and the protection of the class." *Manual for Complex Litigation, Fourth* § 21.33 at 300.

c. *There Was Not Sufficient Individual Notice*

In California class action cases, individual notice is strongly preferred unless personal notification is "unreasonably expensive or the stake of individual class members is insubstantial." C.R.C. 3.766(f). Fed. R. Civ. P. 23(c)(2)(B) requires "individual notice to all [class] members who can be identified through reasonable effort." *See also Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156, 175 ("[T]he names and addresses of 2,250,000 class members are easily ascertainable, and there is nothing to show that individual notice cannot be mailed to each."); *Oppenheimer Fund, Inc. v. Sanders* (1978) 437 U.S. 340, 345 (requiring individual notice even though the parties had to "sort manually through a considerable volume of paper records, keypunch between 150,000 and 300,000 computer cards, and create eight new computer programs for use with records kept on computer tapes that either are in existence or would have to be created from the paper records. … The cost of these operations was estimated in 1973 to exceed $16,000").

In *Larson*, the objectors demonstrated that 4.1 million class members, many of whom were Subscriber Class members, could have been identified at a relatively modest cost of approximately 2.4 cents per class member. *See* 10/19/09 Second Supplemental Declaration of Scott A. Bursor ¶ 6, Exh. J to the Fisher Decl.; 10/19/09 Declaration of Colin Weir, Exh. K to the Fisher Decl. Where class members can be identified so cheaply and so easily, they should get individual notice – especially when they are members of an already certified class and their rights are being prejudiced. Remarkably, Judge Linares refused to consider this evidence on the theory that certain objectors had waived their rights to challenge the notice. *See* 1/15/10 Opinion at 20 and n. 18, Exh. H to the Fisher Decl.[4] But neither the Subscriber Class representative nor millions of Subscriber Class members were objectors in the *Larson* case. Plaintiff Zill, the class representative here, and millions of other Subscriber Class members, made the decision not to challenge the *Larson* settlement in New Jersey to preserve their ability to collaterally attack the *Larson* judgment in this Court. Thus, even if certain *Larson* objectors did waive their objections to the notice, Zill and other members of the Subscriber Class did not. They are entitled to press those arguments before this Court as part of their collateral attack on the *Larson* judgment. This Court must independently evaluate their arguments and must examine the evidence Judge Linares refused to consider.

d. *The* Larson *Notice Contained False Information*

California law requires that the information contained in a class notice be truthful and accurate and not misleading. *See, e.g., Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 251 (The notice "must *fairly apprise* the class members of the terms of the proposed compromise and of the options open to dissenting class members.") (emphasis added). "The principal purpose of notice to the class is the *protection of the integrity of the class action process*." *Cartt*, 50 Cal.App.3d at 970 (emphasis added). In *Trotsky v. Los Angeles Fed. Sav. & Loan Assn.* (1975) 48 Cal.App.3d 134, the Court of Appeal reversed an order granting final approval to a settlement because the class notice failed to disclose the existence of another case against the same

[4] The objectors are appealing Judge Linares' ruling that they waived their right to challenge the notice.

defendant which would be barred by the settlement. *Id.* at 146. The court held that the failure to give notice to the class concerning the existence of the other case and the effect of the settlement "prevented a full and fair consideration of the adequacy of the settlement." *Id.* The court noted that "the existence of another purported class action . . . would have been highly significant to the members of the . . . class in deciding whether they should object to the *Trotsky* settlement or request exclusion from the class." *Id.* at 152. Although the federal court in *Larson* was not bound by *Trotsky*, this court is bound by that decision. *See Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 (discussing the "rule requiring a court exercising inferior jurisdiction to follow the decisions of a court exercising a higher jurisdiction"). Thus, regardless of whatever standards were applied by the federal court in New Jersey, in *this* court, *Trotsky* is binding and controlling authority establishing the inadequacy of the *Larson* notice.

As in *Trotsky*, the long form notice in *Larson* did not disclose information that Subscriber Class members would have found significant in deciding whether to object or request exclusion from the settlement. The Long Form Notice in *Larson* stated:

> This notice does not imply that there have been or would be any findings of violation of the law by Sprint Nextel ....

Long Form Notice at 2, Exh. I to the Fisher Decl. That statement is false, or at best misleading. *See* 2/6/09 Affidavit of Todd B. Hilsee on Settlement Notices and Notice Plan ¶ 64, Exh. L to the Fisher Decl. ("In fact, the information in the Long Form Notice about the legality of the ETF is essentially a lie."). The truth is that there *has* been a finding of violation of the law by Sprint Nextel. *See, e.g.*, 12/4/08 Statement of Decision at 22:12-15 ("Plaintiffs have demonstrated that the ETF is a violation of Civil Code § 1671(d) and any monies paid to Sprint for ETFs must be returned to Plaintiffs."); *id.* at 1:19-23, ("Because the liquidated damage provision is invalid, the Court enjoins Sprint from attempting to collect the unpaid flat ETFs and requires Sprint to provide this decision to third parties owners of Sprint's accounts receivable that might include ETFs."). The *Larson* notice was false when it was published on December 31, 2008, and it remained uncorrected throughout the pendency of that action.

This false information was not a minor or peripheral issue. It goes to the heart of the Subscriber Class's claims. The fact that Sprint's ETF had been found illegal meant that it could not be enforced against Subscriber Class members – unless their claims challenging the ETFs were released by the *Larson* settlement. Thus, in deciding whether to opt out, a Subscriber Class member surely would want to know that by opting out he or she would have full advantage of the ruling of illegality – meaning the $200 ETF could not be enforced against them. It is difficult to conceive of any circumstance in which a rational and fully-informed member of the Subscriber Class would agree to bear a $200 ETF on pain of an adverse credit report in exchange for the purported $25 maximum benefit permitted under the *Larson* settlement.

e. There Were Numerous Other Defects in the Larson Notice

The class members who objected to the *Larson* settlement also identified a number of defects in the notice. Class notice expert Todd B. Hilsee submitted two detailed affidavits identifying numerous problems with both notice plans in the *Larson* action.[5] *See* 2/6/09 Hilsee Affidavit, Exh. L to the Fisher Decl.; 10/7/09 Hilsee Supplemental Affidavit, Exh. N to the Fisher Decl.[6] Mr. Hilsee also identified significant defects in the design and content of the notice. *See* 2/6/09 Hilsee Affidavit at ¶¶ 47-81. Mr. Hilsee noted that the class definition was an "indecipherable run-on sentence of 176 words . . . certain to be misunderstood." *Id.* at ¶¶ 58-61. Mr. Hilsee also explained that the *Larson* notices were not written clearly in plain language that could be easily understood by class members. *See id.* at ¶¶ 71-74; *see also* 10/7/09 Hilsee Supplemental Affidavit at ¶¶ 18-19, 22-26. Even though Sprint and the *Larson* plaintiffs had two opportunities to get it right, there were significant problems with the notices and they failed to ensure that the class received the notice to which it was entitled.

[5] As the Court may recall, Judge Linares rejected the original notice plan in an opinion dated April 29, 2009. Exh. M to the Fisher Decl. A second notice plan followed and was subsequently approved by Judge Linares.

[6] Plaintiffs incorporate Mr. Hilsee's affidavits by reference as though set forth fully herein.

Plaintiffs respectfully submit this memorandum of points and authorities in support of their renewed application for an order to show cause and temporary restraining order.[1]

I. INTRODUCTION

Plaintiffs renew their application for a temporary restraining order ("TRO") to stop defendant Sprint Nextel from charging and collecting illegal early termination fees ("ETFs"). Plaintiffs filed their initial application for a TRO on December 26, 2008 after Judge Bonnie Sabraw ruled that Sprint's[2] flat ETFs were illegal. *See* 12/4/08 Statement of Decision at 1:19-23 ("Because the liquidated damage provision is invalid, the Court enjoins Sprint from attempting to collect the unpaid flat ETFs and requires Sprint to provide this decision to third parties owners of Sprint's accounts receivable that might include ETFs.").

On January 2, 2009, this Court issued a tentative ruling finding that plaintiffs had demonstrated "a probability of success on the merits" and would "suffer irreparable harm if an injunction [was] denied." 1/2/09 Tentative Ruling, Exh. A to the Declaration of L. Timothy Fisher (the "Fisher Decl."). Nevertheless, the Court refused to grant plaintiffs' application in its entirety due to the pendency of the settlement in *Larson v. Sprint*, United States District Court for the District of New Jersey Case No. 07-5325. Before the Court finalized its tentative ruling granting the TRO, the federal court in the *Larson* case enjoined further proceedings here under the All Writs Act, 28 U.S.C. § 2283. The *Larson* settlement has now been concluded and the All Writs Act injunction has been lifted. As such, there is no longer any impediment to this Court's full and independent consideration of plaintiffs' application for a TRO.

The Court should grant plaintiffs' application for the TRO in full because the merits have been established by Judge Sabraw's 12/4/08 Statement of Decision. Sprint's only defense is res

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[1] Plaintiffs hereby incorporate by reference the Memorandum of Points and Authorities in Support of Plaintiffs' Application for Order to Show Cause and Temporary Restraining Order filed on December 26, 2008 in this action. A copy of that memorandum is attached as Exhibit B to the Fisher Decl.

[2] Plaintiffs use the name "Sprint" to refer collectively to the pre-merger Sprint and Nextel companies and to post-merger Sprint Nextel. The ETFs of each of these entities were at issue in the *Ayyad* trial, and each was found illegal.

judicata based on the *Larson* judgment, which is faulty due to the numerous defects in the *Larson* settlement described below.

II. STATEMENT OF FACTS

On December 4, 2008, Judge Bonnie Sabraw issued a statement of decision in *Ayyad*. Judge Sabraw ruled that Sprint Nextel's flat ETFs were illegal and enjoined Sprint Nextel from enforcing them. *See* 12/4/08 Statement of Decision at 1:19-23. Judge Sabraw declared:

> Because the liquidated damage provision is invalid, the Court enjoins Sprint from attempting to collect the unpaid flat ETFs and requires Sprint to provide this decision to third parties owners of Sprint's accounts receivable that might include ETFs.

Id. The Court found that Sprint's, Nextel's, and post-merger Sprint Nextel's ETFs violate Civil Code § 1671(d), the CLRA, the UCL unlawful and unfair prongs, and also found in favor of the *Ayyad* plaintiffs on their common law claims for unjust enrichment and money had and received. The Court also ruled that Sprint's defenses based on federal preemption and alternate means of performance were meritless. In other words, the Court ruled in favor of plaintiffs on each and every one of plaintiffs' affirmative claims and ruled against Sprint on each and every one of Sprint's defenses to those claims. After a full trial on the merits, the central issue in these lawsuits had been resolved. Sprint's ETFs are illegal penalties. They cannot be enforced.

Four days after Judge Sabraw's decision, this Court granted preliminary approval of the proposed settlement in *Larson*. This preliminary approval was obtained without notice to the *Ayyad* plaintiffs or their court-appointed, *certified* class counsel.

The settlement of the *Larson* case was a last-ditch effort by Sprint to avoid the consequences of having lost the *Ayyad* trial. Even in the wake of Judge Sabraw's decision and the injunction it imposed, Sprint Nextel continues to enforce the very same illegal ETFs. For new customer agreements made after November 2, 2008, Sprint has switched to a pro-rated ETF. But that switch does not affect millions of existing Sprint contracts made before November 2, 2008, such as those under which many existing customers have been charged and are being dunned.

IV. CONCLUSION

This Court already determined that plaintiffs have satisfied the criteria for a TRO under Code of Civil Procedure section 526(a). Now that the *Larson* settlement is complete and the injunction which prevented the Court from acting in 2009 has been dissolved, the Court should grant plaintiffs' renewed application for a TRO. Class members' due process rights would be violated by giving res judicata effect to the *Larson* judgment because class members were not adequately represented and were not given adequate notice.

Dated: February 11, 2010

Respectfully submitted,

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EXHIBIT B

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LARSON, et al., Plaintiffs, v. AT&T MOBILITY LLC, et al., Defendants.	CIVIL ACTION NO. 07-5325 (JLL) **ORDER**

LINARES, District Judge.

This matter comes before the Court on two separate Orders to Show Cause, which were issued on December 31, 2008, and January 7, 2009, respectively. The Orders pertained to: (1) Sprint's motion – pursuant to the All Writs Act, 28 U.S.C. § 1651(a) – to stay the *Ayyad* subscriber class litigation currently underway as part of the In re Cellphone Termination Fee Cases, JCCP 4332 (Alameda County Superior Court, State of California) ("Subscriber Class Case"); (2) Sprint's motion to also stay the ongoing California arbitration captioned Smith v. Sprint Spectrum, L.P., et al., No. 1220034325 (JAMS arbitration) ("Smith Arbitration");[1] and (3) Smith Arbitration counsel's ("Smith Counsel") motion to effect a mass opt-out of his class from the Larson settlement or alternatively to compel Sprint to provides the names, addresses, and contact information of his respective class members.

The Court having considered the briefs and other submissions of counsel, and having heard extensive oral argument on January 15, 2009, as to all issues; and for good cause shown, the Court finds as follows:

[1] Plaintiffs' counsel in the Larson matter ("Larson Counsel") join Sprint's motions.

(1) This Court possesses jurisdiction over absent Larson class members as part of the settlement in the instant case ("Larson Settlement"). Notice has gone out and the opt-out period is currently running, Carlough v. Amchem Prods., 10 F.3d 189, 201 (3d Cir. 1993) (commencement of opt-out period and dissemination of notice is sufficient for the court's exercise of personal jurisdiction over absent class members). In addition, in its conditional approval of the Larson Settlement, this Court preliminarily found that the absent class members were adequately represented by Larson Counsel.

(2) The All Writs Act is limited in scope and application by the Anti-Injunction Act, 28 U.S.C. § 2283. Under the Anti-Injunction Act, a Court cannot enjoin a state action unless the enjoining court acts "where necessary in aid of jurisdiction."[2] The Third Circuit has set forth a three-part test to determine whether a court should invoke this exception to the Anti-Injunction Act:

> First, we look to the nature of the federal action to determine what kinds of state court interference would sufficiently impair the federal proceeding. Second, we assess the state court's actions, in order to determine whether they present a sufficient threat to the federal action. And finally, we consider principles of federalism and comity, for a primary aim of the Anti-Injunction Act is to prevent needless friction between the state and federal courts.

In re Diet Drugs, 282 F.3d 220, 234 (3d Cir. 2002). Moreover, the Third Circuit has identified complex nationwide class actions with conditional settlements in place (as is the case here) as being particularly vulnerable to competing state actions. Id. at 236 ("In complex cases where

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[2] The Anti-Injunction Act precludes a court from "grant[ing] an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. No Act of Congress and no court judgment is at issue here; therefore, only the "in aid of jurisdiction" exception applies.

certification or settlement has received conditional approval, or perhaps even where settlement is pending, the challenges facing the overseeing court are such that it is likely that almost any parallel litigation in other fora represents a genuine threat to the jurisdiction of the federal court.")

(3) The Subscriber Class is currently proceeding with summary judgment motions regarding the issue of whether or not Sprint's imposition of a flat-rate early termination fee ("ETF") is illegal under California law. Subscriber Class Counsel seeks to obtain, from Judge Winifred Smith of the Superior Court of California, an injunction preventing Sprint from charging flat-rate ETFs to any California customers covered by the Subscriber Class.

(4) To allow the Subscriber Class Case to go forward with its request for injunctive relief in California would directly undermine the Larson Settlement by placing California consumers in a different position vis-à-vis the rest of the members of the Larson Settlement class and by giving California consumers a different set of benefits than that accorded to the entire class. Because the Court finds the Subscriber Class members to be covered in full by the Larson Settlement, any further state court litigation regarding that class – prior to this Court's final approval hearing regarding the Larson Settlement – will have the effect of obstructing this Court's "path to judgment." Diet Drugs, 282 F.3d at 234 ("the state action must not simply threaten to reach judgment first, it must interfere with the federal court's own path to judgment.") Specifically, this Court finds a substantial likelihood that any decision in the Subscriber Class Case would effectively scuttle a significant portion of the Larson Settlement and threaten its ultimate viability.

(5) Smith Counsel's class – defined generally as those consumers across all states

except for California who paid or were charged an ETF in excess of their remaining monthly recurring charges – is completely subsumed by the Larson Settlement. Thus, each Smith class member has a remedy under the Larson Settlement. Therefore, the Court finds that further prosecution of the Smith Class claims would directly undermine and preempt this Court's path to judgment regarding the Larson Settlement.

(6) The fact that notice has been issued and the opt-out period has ended in the Smith Arbitration distinguishes it factually from any other case that has thus far addressed the propriety of enjoining parallel state court actions that threaten to undermine a federal class action settlement.[3] Seizing upon this difference, Smith Counsel contends that upon notice, and in any event upon the conclusion of the opt-out period in the Smith Arbitration, the Smith Class had an attorney-client relationship with Smith Counsel. This relationship, the argument goes, precluded Sprint and Larson Counsel from negotiating a settlement that encompassed the Smith Class without first consulting with Smith Counsel. This Court disagrees. Rather, in an apparent issue of first impression, this Court finds that allowing the running of a state court opt-out period to play a role in undermining a federal court settlement would effectively cause a race to the courthouse whereby attorneys in state class actions would seek to disseminate notice and close the opt-out period as quickly as possible. Instead of sanctioning or encouraging such practice, this Court chooses to follow the principles enunciated by the Third Circuit, whereby a federal

[3] Neither party could cite to a case where the settling court sought to enjoin an action that had already completed its notice and opt-out period. This Court, having searched for such a case, also came up empty. Thus, the Court treats this issue as a novel one.

court can enjoin parallel state court proceedings in order to protect its jurisdiction.[4] Here, the Smith Arbitration is a certified class with no settlement in place, and its further prosecution will clearly obstruct this court's consideration of final approval of the Larson Settlement.[5]

(7) It is well-settled that the right to opt-out of a class action is an individual one. See, e.g., Hanlon v. Chrysler Corp., 150 F.3d 1011, 1024 (9th Cir. 1998) ("[t]he right to participate, or to opt out, is an individual one and should not be made by the class representative or class counsel.") The Third Circuit has repeatedly upheld efforts by district courts enjoin state court plaintiff from effecting mass opt-outs from federal actions. See, e.g., Carlough v. Amchem Prods., 10 F.3d 189, 198 (3d Cir. 1993). Given the overwhelming amount of law denying mass opt-outs, Smith Counsel fails to convince this Court that a mass opt-out of any sort is applicable here. Thus, Smith Counsel cannot opt out his class *en masse* from the Larson Settlement. The Court also finds that Sprint is not obligated to provide to Smith Counsel the names and contact information of each of his class members, such that he might effect an opt-out on behalf of each

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[4] An arbitration is a "state proceeding" for purposes of the Anti-Injunction Act "if it has been ordered or its award enforced by court in judicial (as opposed to merely ministerial) proceedings." Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc., 204 F.3d 867, 879 (9th Cir. 2000). The Smith Arbitration resulted from a Florida state court order. Thus, the Anti-Injunction act applies.

[5] Notably, Smith Counsel does not argue that the Smith Arbitration will not obstruct this Court's path to judgment. Rather, Smith Counsel hangs his hat on the attorney-client argument and the notion that the running of an opt-out period suffices to remove his case from All Writs Act jurisdiction. Smith Counsel also makes the additional argument that the Smith Arbitration – because it was first-filed – cannot be enjoined. The Third Circuit has clearly rejected the earlier-filed argument. Diet Drugs, 282 F.3d at 238 n.14 ("it is conceivable that an earlier filed state court action might present just as great an interference with the federal proceeding as a later filed state action"); see also In re Community Bank of Northern Virginia and Guaranty Bank Second Mortgage Litigation, No. 03-425, 2008 WL 821662, *6 (W.D.Pa. March 27, 2008) (enjoining earlier-filed state case). Moreover, this Court rejects Smith Counsel's attorney-client argument.

named individual. Such a holding would effectively result in a prohibited mass opt-out and violate the right of an individual to make the opt-out decision. Furthermore, the ruling would potentially scuttle the Larson Settlement because of Sprint's ability to void the Larson Settlement if it results in a certain percentage of opt-outs.

ACCORDINGLY, IT IS THEREFORE on this 15th day of January, 2009,

ORDERED that Sprint's motion to temporarily enjoin Subscriber Class Counsel from any further prosecution of its claims in California state court is **GRANTED**; and it is further

ORDERED that the Subscriber Class Case is hereby stayed until the earlier of 45 days after this Court's final approval hearing regarding the Larson Settlement OR the date of issuance of this Court's opinion approving or denying the Larson Settlement; and it is further

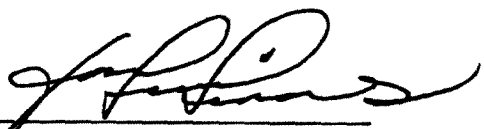
ORDERED that Sprint's motion to temporarily enjoin Smith Counsel from further prosecution of his claims is **GRANTED**; and it is further

ORDERED that the Smith Arbitration matter is hereby stayed until the earlier of 45 days after this Court's final approval hearing regarding the Larson Settlement OR the date of issuance of this Court's opinion approving or denying the Larson Settlement; and it is further

ORDERED that Smith Counsel's request to effect a general mass opt-out of his class or to compel Sprint to provide names and addresses of the member of his class is **DENIED**; and it is further

ORDERED that Sprint shall forward a copy of this Order to Judge Winifred Smith and Judge Stephen E. Haberfeld (ret.).

SO ORDERED.



Jose L. Linares
United States District Judge

EXHIBIT C

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February 5, 2010

VIA ECF

Honorable Jose L. Linares, U.S.D.J.
United States District Court
M.L. King, Jr. Federal Building & Courthouse
50 Walnut Street
Newark, New Jersey 07101

Re: ***Larson, et al. v. AT&T Mobility, et al.***
Civil Action No. 07-5325 (JLL)

Dear Judge Linares:

We are co-counsel for the Class in the above matter. In accordance with the terms of the Settlement Agreement and Fed.R.Civ.P. 54(b), enclosed is a proposed form of Final Judgment, which is substantially in the form which was attached as Exhibit B to the Settlement Agreement. The form of Final Judgment has been modified to reflect events which have occurred subsequent to the filing of the Settlement Agreement, and has been agreed upon by the parties. If it is acceptable to the Court, kindly sign the Judgment and have a "filed" copy returned to us via the Court's ECF system.

Thank you for your continued attention to this matter. If the Court has any questions, we are available at your convenience.

Respectfully submitted,

CARELLA, BYRNE, CECCHI,
OLSTEIN, BRODY & AGNELLO, P.C.

/s/ James E. Cecchi

JAMES E. CECCHI

Enclosures

cc: All Counsel (via ECF)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JUDY LARSON, BARRY HALL, JOE MILLIRON, TESSIE ROBB and WILLIE DAVIS, individually and on behalf of all others similarly situated, Plaintiffs, vs. AT&T MOBILITY LLC f/k/a CINGULAR WIRELESS LLC and SPRINT NEXTEL CORPORATION and SPRINT SPECTRUM L.P. d/b/a SPRINT NEXTEL Defendants.	Civil Action No. 07-5325 (JLL) **FINAL JUDGMENT**

1. Sprint Nextel and the Class Representatives reached a settlement (the "Settlement"). The Parties have submitted a detailed written Stipulation and Settlement Agreement (the "Agreement") together with numerous exhibits and proposed orders. To the extent not otherwise defined herein, all capitalized terms shall have the meanings attributed to them in the Agreement. The Court gave its preliminary approval of the Settlement on December 5, 2008 (the "Preliminary Approval Order"). The Court directed the parties to provide notice of the proposed Settlement by Invoice Notice, Publication Notice and via the internet for a final fairness hearing that was initially conducted on March 12, 13, 16 and 17. Pursuant to Court order, additional notice was provided through an Amended Notice Plan and the final fairness hearing was continued and concluded on October 21, 2009 (the "Fairness Hearing").

2. This Court conducted the Fairness hearing to determine whether the proposed Settlement is fair, reasonable and adequate and whether the Settlement set forth in the Agreement executed by the Parties should be approved in final by this Court. Carella, Byrne,

Bain, Gilfillan, Cecchi, Stewart & Olstein, Freed & Weiss and Seeger Weiss appeared for the Plaintiffs and the Settlement Class. Kelley, Drye & Warren LLP and Quinn Emanuel Urquhart Oliver & Hedges appeared for defendants Sprint Nextel. Fourteen objections were filed with respect to the proposed Settlement, and six sets of Settlement Class Members appeared at the hearing to contest the Settlement.

3. After reviewing the pleadings and evidence filed in support of the request for final approval of the Settlement and hearing the attorneys for the Parties, and any objectors, the Court finds, for the reasons set forth in the Court's Opinion dated January 15, 2010 [Docket Entry 438]

IT IS THIS day of January, 2010

ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

4. This Final Approval Order and Judgment incorporates and makes part hereof the Agreement and all Exhibits thereto and the contents of the January 15, 2010 Order [Docket Entry 437].

5. The Court has personal jurisdiction over all Settlement Class Members and Sprint, Nextel, and the Court has subject matter jurisdiction to approve the Agreement and all Exhibits thereto.

6. Based upon the record before the Court, including all submissions in support of the Class Settlement set forth in the Agreement, objections and responses there, as well as the Agreement itself, the Court hereby certifies the following nationwide class (the "Settlement Class") for settlement purposes only:

> All persons in the United States who are or were parties to a personal fixed-term subscriber agreement for a Sprint Nextel Wireless Service Account for personal or mixed business/personal use, whether on the Sprint CDMA network or Nextel iDen network, or both, **excluding accounts** for which the responsible party for the Wireless Service Account is a business, corporation

> or a governmental entity, entered into between July 1, 1999 and December 31, 2008 and whose claims relate in any way to an Early Termination Fee or use of an Early Termination Fee in a fixed-term subscriber agreement, and/or use or propriety of a fixed-term subscriber agreement whether the term was for the initial fixed-term subscriber agreement or subsequent extensions or renewals to the fixed-term subscriber agreement for whatever reason and/or who were charged by or paid an Early Termination Fee to Sprint Nextel, excluding only the *Ayyad* Class Claims and Persons whose right to sue Sprint Nextel as a Settlement Class Member is otherwise barred by a prior settlement agreement and/or prior final adjudication on the merits. The Settlement Class includes Persons who were subject to an ETF, whether or not they paid any portion of the ETF either to Sprint Nextel or to any outside collection agency or at all, and includes persons who are prosecuting excluded claims to the extent such persons have claims other than those expressly excluded.

In so holding, the Court finds that the prerequisites of Fed.R.Civ. P. 23(a) & (b)(3) have been satisfied for certification of the nationwide Settlement Class for settlement purposes because: Settlement Class Members, numbering in the millions, are so numerous that joinder of all members is impracticable; there are questions of law and fact common to the Settlement Class; the claims and defenses of the Class Representatives are typical of the claims and defenses of the Settlement Class Members they represent; the Class Representatives have fairly and adequately protected the interests of the Settlement Class with regard to the claims of the Settlement Class they represent; the common questions of law and fact predominate over questions affecting only individual Settlement Class Members, rendering the Settlement Class sufficiently cohesive to warrant a nationwide class settlement; and the certification of the Settlement Class is superior to individual litigation and/or settlement as a method for the fair and efficient resolution of this matter. In making all of the foregoing findings, the Court has exercised its discretion in certifying the Settlement Class, based, *inter alia*, upon the Court's familiarity with the claims and parties in this case, the interests of the various constituent groups, and the negotiation process overseen by Mediator Nicholas H. Politan.

7. The Court further finds with respect to entry of the Prospective Relief that the Settlement Class should be certified pursuant to Fed.R.Civ.P. 23(b)(2) because Sprint Nextel has acted or refused to act on grounds that apply generally to the Settlement Class, so that injunctive or corresponding declaratory relief is appropriate respecting the Settlement Class as a whole.

8. The Agreement and proposed Settlement were reached after arm's-length negotiations between the Parties. The Agreement and the proposed Settlement are fair, reasonable, and adequate; consistent with and in compliance with all applicable requirements of the Federal Rules of Civil Procedure, the United States Code and United States Constitution (including the Due Process Clause), and any other applicable law; and in the best interests of each of the Parties and the Settlement Class Members.

9. The Court finds that in negotiating, entering into, and implementing the Settlement, the Plaintiffs and the Class Counsel have fairly and adequately represented and protected the interests of all of the Settlement Class Members.

10. The Notice and the notice methodology implemented pursuant to the Agreement and the Amended Notice Plan (i) constituted the best practicable notice; (ii) constituted notice that was concise, clear and in plain, easily understood language and was reasonably calculated, under the circumstances, to apprise Settlement Class Members of the pendency of the Action, the claims, issues and defenses of the Settlement Class, the definition of the Settlement Class certified, their right to be excluded from the Settlement Class; their right to object to the proposed Settlement, their right to appear at the Final Approval Hearing, through counsel if desired, and the binding effect of a judgment on Settlement Class Members; (iii) were reasonable and constituted due, adequate, and sufficient notice to all persons entitled to receive notice; and (iv) met all applicable requirements of the Federal Rules of Civil Procedure, the United States

Code, the United States Constitution (including the Due Process Clause), and any other applicable law.

11. The terms of the Agreement and this Final Approval Order and Judgment are binding on the Plaintiffs and all other Settlement Class Members, as well as their heirs, executors and administrators, successors and assigns.

12. As set forth in the Agreement and by operation of law, and incorporated by reference hereto, the terms of the Agreement and this Final Approval Order and Judgment shall have *res judicata*, collateral estoppel and all other preclusive effect in any and all claims for relief, causes of action, suits, petitions, demands in law or equity, or any allegations of liability, damages, debts, contracts, agreements, obligations, promises, attorneys' fees, costs, interests, or expenses which are based on or in any way related to any and all claims for relief, causes of action, suits, petitions, demands in law or equity, or any allegations of liability, damages, debts, contracts, agreements, obligations, promises, attorneys' fees, costs, interest, or expenses which were asserted in the Action or any other claims under state or federal law which arise from, are based on or in any way related to Sprint Nextel's fixed ETF charges.

13. The Parties and their counsel are ordered to implement and to consummate the Agreement according to its terms and provisions.

14. All claims against Sprint Nextel in this case, are hereby dismissed on the merits and with prejudice, without fees or costs to any party except as provided below.

15. The releases set forth in Article VI of the Agreement are incorporated by reference and provides, *inter alia*, that for and in consideration of the Cash Benefits, Non-Cash Benefits, Prospective Relief and Sprint Nextel Released Claims and the mutual promises contained in the Agreement, Plaintiffs and the Settlement Class Members, on behalf of

themselves and their respective agents, heirs, executors, administrators, successors, assigns, guardians, and representatives, fully and finally release, as of the date Final Approval Order becomes Final, Sprint Nextel from any and all claims for relief, causes of action, suits, petitions, demands in law or equity, or any allegations of liability, damages, debts, contracts, agreements, obligations, promises, attorneys' fees, costs, interest, or expenses which were asserted in the Action or any other claims under state or federal law which arise from, are based on or in any way related to the Action or the Class Released Claims. The Class Released Claims include, without limitation, all claims relating to Sprint Nextel's fixed ETF charges.

16. The Parties are authorized, without further approval from the Court, to agree to and to adopt such amendments, modifications and expansions of the Agreement and all exhibits attached hereto as (i) are consistent with the Final Approval Order and Judgment, and (ii) which do not limit the rights of Settlement Class Members under the Agreement.

17. The Court hereby grants Class Counsel's request for an award of reasonable attorneys' fees and reimbursement of costs and expenses in the amount of $5,755,000. In addition, the Court makes an Incentive Award for the Class Representatives in the amount of $3,000 for each Class Representative.

18. The Court further approves the establishment of the Common Fund as set forth in the Agreement and the Escrow Agreement submitted by the Parties.

19. The Court finds that the Escrow Account is a "Qualified Settlement Fund" as defined in section 1.468B-1(a) of the Treasury Regulations in that it satisfies each of the following requirements:

(a) The Escrow Account is established pursuant to an order of this Court and is subject to the continuing jurisdiction of this Court;

(b) The Escrow Account is established to resolve or satisfy one or more contested or uncontested claims that have resulted or may result from an event that has occurred and that has given rise to at least one claim asserting liability arising out of an alleged violation of law; and

(c) The Assets of the Escrow Account are segregated from other assets of Sprint Nextel, the transferor of payments to the Settlement Fund, and from the assets of persons related to Sprint Nextel.

20. Under the "relation-back" rule provided under section 1.468B-1(j)(2)(i) of the Treasury Regulations, the Court finds that:

(a) The Escrow Account met the requirements of Paragraph 19 of this Order prior to the date of this Order approving the establishment of the Common Fund subject to the continued jurisdiction of this Court; and

(b) Sprint Nextel and the "administrator" under section 1.468B-2(k)(3) of the Treasury Regulations may jointly elect to treat the Escrow Account as coming into existence as a "Qualified Settlement Fund" on the later of the date the Escrow Account met the requirements of Paragraphs 13(b) and 13(c) of this Order or January 1 of the calendar year in which all of the requirements of Paragraph 13 of this Order are met. If such relation-back election is made, the assets held by the Escrow Account on such date shall be treated as having been transferred to the Escrow Account on that date.

21. Nothing in this Final Approval Order and Judgment, the Class Settlement, the Agreement, or any documents or statements related thereto, is or shall be deemed or construed to be an admission or evidence of any violation of any statute or law or of any liability or wrongdoing by Sprint Nextel.

22. In the event that the Class Settlement does not become effective according to the terms of the Agreement, this Final Approval Order and Judgment shall be rendered null and void as provided by the Agreement, shall be vacated and, all orders entered and released delivered in connection herewith shall be null and void to the extent provided by and in accordance with the Agreement.

23. No Settlement Class Member, either directly, representatively, or in any other capacity (other than a Settlement Class Member who validly and timely submitted a valid Request for Extension), shall commence, continue, or prosecute any action or proceeding against any or all Sprint-Nextel Released Parties in any court or tribunal asserting any of the Class Released Claims defined in the Agreement, and are hereby permanently enjoined from so proceeding.

24. Without affecting the finality of the Final Approval Order and Judgment, the Court shall retain continuing jurisdiction over the Action, the Parties and the Settlement Class, and the administration and enforcement of the Settlement. Any disputes or controversies arising with respect to the enforcement or implementation of the Settlement shall be presented by motion to the Court, provided, however, that nothing in this paragraph shall restrict the ability of the Parties to exercise their rights under Paragraphs 12,13, 14 and 16 above.

25. In accordance with Fed.R.Civ.P. 54(b), there being no just reason to delay, the Clerk is directed to enter this Final Approval Order and Judgment forthwith.

JOSE L. LINARES, U.S.D.J.